

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

JAMES SEABA and CORY PHILLIPS,

Plaintiffs,

v.

MESOSYSTEMS TECHNOLOGY, INC.,

Defendant.

02 JUN 17 PM 1:44

NO. CIV-02-0103 LH/WWD

**DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO  
SUPPLEMENT ITS REPLY MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS OR TRANSFER FOR IMPROPER VENUE**

Defendant MesoSystems Technology, Inc. ("MesoSystems") has argued in Section C of its Reply brief that its motion to dismiss or transfer is brought pursuant to 28 U.S.C. § 1406(a) (and Rule 12(b)(3)) as a motion for *improper venue*, as opposed to a motion pursuant to 28 U.S.C. § 1404(a) for *inconvenient venue*. Because the parties agreed to a forum selection clause in their written contract, the Court should analyze this motion under 28 U.S.C. § 1406(a) and considerations of convenience are not relevant under Section 1406(a) analysis.

Nonetheless, MesoSystems further argued that even if the Court were to weigh considerations of convenience under 28 U.S.C. § 1404(a), Plaintiffs have failed to meet their burden, imposed by the contractual venue provision, to show that the balance of convenience tips decidedly in favor of New Mexico. Plaintiffs alleged that MesoSystems persuaded them to move to New Mexico and pleaded in their Complaint that this is their residence. However, as a result of a recently concluded investigation, MesoSystems has obtained newly discovered evidence showing that neither Plaintiff now resides in New Mexico. Mr. Seaba apparently now resides in Iowa and Mr. Phillips in Michigan. See affidavit of Robert Hamic attached as Exhibit A to MesoSystem's

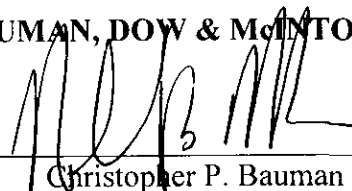
Motion. Clearly, Plaintiffs cannot show that New Mexico is a more convenient forum for them than Washington. The forum selection clause should be given its full effect. New Mexico is an improper forum, and is no more convenient than Washington, the forum the parties contractually chose.

DATED: 6/12/02.

Respectfully Submitted:

**BAUMAN, DOW & McINTOSH, P.C.**

By



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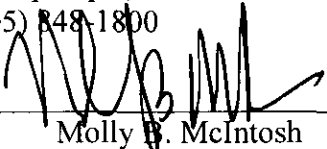
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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Motion to Supplement was mailed via U.S. Mail to the following, on this 12 day of June, 2002.

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